

Dkt. #683

THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant(s) : Herbert Howell Waddell
U.S. Serial No. : 09/693,239 Examiner: Nathan S. Mammen
Filing Date : October 20, 2000 Art Unit: 3671
For : APPARATUS FOR GATHERING, PICKING UP AND
CARRYING LOOSE MATERIALS

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August 11, 2005

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Sir/Madam:

APPEAL BRIEF

This amended Appeal Brief is being submitted in response to the July 11, 2005 Notification of Non-Compliant Appeal Brief (Notification) which was issued by the United States Patent and Trademark Office (USPTO) in connection with the above-identified application. The previous Appeal Brief was submitted on April 28, 2005 in furtherance to the November 29, 2004 Final Office Action issued by the USPTO.

In the November 29, 2004 Final Office Action, the Examiner finally rejected all of Appellant's claims. A copy of the Final Office Action is attached hereto as **Exhibit B**. In response, on February 28, 2005, Appellant filed a Notice of Appeal from the Examiner to the Board of Patent Appeals and Interferences. A copy of the Notice of Appeal is attached hereto as **Exhibit A**. The USPTO indicated that the Notice of

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 2

Appeal was deemed received on February 28, 2005. An Appeal Brief, at that time, was thus due April 28, 2005, two months from the receipt date of the Notice of Appeal. Accordingly, the previous Appeal Brief was timely filed.

The required fee for filing an appeal brief is TWO HUNDRED AND FIFTY DOLLARS (\$250.00) for a small entity. However, in addition to the April 28, 2005 Appeal Brief, an earlier Appeal Brief was filed on March 1, 2004, along with the requisite fee at the time of ONE HUNDRED AND SIXTY-FIVE DOLLARS (\$165.00) for a small entity. A final Board decision was not made on the previous appeal. Accordingly, the fee paid earlier applied toward the fee for the April 28, 2005 Appeal Brief. 69 Fed. Reg. 49959, 49975. On April 28, 2005, Appellant submitted a check, along with the previous Appeal Brief, in the amount of EIGHTY-FIVE DOLLARS (\$85.00) to cover the difference between the current Appeal Brief fee and the amount paid earlier.

Accordingly, no fee is deemed necessary in connection with the filing of this amended Appeal Brief in response to the July 11, 2005 Notification. However, if any fee is required, authorization is hereby given to charge the amount of any such fee to Deposit Account No. 50-1891.

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 3

TABLE OF CONTENTS

I.	REAL PARTY IN INTEREST	5
II.	RELATED APPEALS AND INTERFERENCES	5
III.	STATUS OF CLAIMS	5
IV.	STATUS OF AMENDMENTS	5
V.	SUMMARY OF CLAIMED SUBJECT MATTER	5
VI.	GROUND OF REJECTION TO BE REVIEWED ON APPEAL	7
VII.	ARGUMENT	7
	1. Summary of Patent Prosecution History	7
	a. Background Prosecution History	7
	b. Recent Prosecution History	10
	2. 35 U.S.C. §102(b) Rejection: Anticipation by Davis	11
	3. 35 U.S.C. §102(b) Rejection: Anticipation by Lee	16
	4. 35 U.S.C. §102(b) Rejection: Anticipation by Laramie	18
	5. 35 U.S.C. §103(a) Rejection: Obviousness in light of Davis and Cox	21
VIII.	CLAIMS APPENDIX	
IX.	EVIDENCE APPENDIX	
	Exhibit A February 28, 2005 Notice of Appeal and Communication in Response to November 29, 2004 Final Office Action	
	Exhibit B November 29, 2004 Final Office Action	
	Exhibit C September 17, 2004 Communication in Response to June 18, 2004 Office Action	
	Exhibit D June 18, 2004 Office Action	
	Exhibit E U.S. Patent No. 318,359, Davis, J.E., Issued May 19, 1885	
	Exhibit F U.S. Patent No. 2,997,328, Lee, W.F., Issued August 22, 1961	

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 4

Exhibit G U.S. Patent No. 4,787,663, Laramie, L.A.,
Issued November 29, 1988

Exhibit H U.S. Patent No. 3,688,484, Cox, E.O.,
Issued September 5, 1972

X. RELATED PROCEEDINGS APPENDIX

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 5

I. REAL PARTY IN INTEREST

Appellant Herbert Howell Waddell is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

No prior and pending appeals, interferences, or judicial proceedings have been filed to the knowledge of Appellant, Appellant's legal representative, or assignee which may be related to, directly affect, or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1-15 are rejected. Appellant appeals claims 1-15.

IV. STATUS OF AMENDMENTS

No amendment has been filed by Appellant subsequent to the November 29, 2004 Final Office Action rejecting all claims.

V. SUMMARY OF CLAIMED SUBJECT MATTER

The claimed subject matter pertains to an apparatus for gathering, picking up, and carrying materials, comprising two grasping elements, each having shafts with grasping means at one end, and a flexible coupling means which can be moved along the shafts of the two grasping elements to connect them together while permitting each to rotate about its axis and to pivot with respect to each other so that the grasping means can be brought together or moved apart. Specification, page

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 6

2, line 29, to page 3, line 3, and page 4, lines 26-29; Figures 1-2, reference characters A-C.

The grasping elements may be commercially available rakes or shovels. Specification, page 3, lines 19-20, and page 5, lines 21-22; Figures 1-2, reference character B. The grasping means may be wire tines or shovel heads. Specification, page 3, lines 19-20, and page 5, line 23-24; Figures 1-2, reference character A.

The flexible coupling means may comprise two loops, each having an internal diameter large enough to properly accommodate the shafts of the grasping elements, and joined by a flexible band. Specification, page 4, lines 5-9; Figures 1-2, reference character C, and Figure 3. In another embodiment, the coupling may comprise two loops joined by interlocking links in a short chain. Specification, page 6, lines 23-24. With regard to material of construction, the flexible coupling means may be made of rubber, plastic, rope, leather, metal, and the like. Specification, page 6, lines 8 and 23. The coupling may be fabricated by methods such as compression, injection molding, braiding, and cutting. Specification, page 6, lines 8-9.

Loose materials are gathered and picked up by placing one hand on the shaft of each grasping element and drawing the heads together such that the coupled shafts pivot past each other in a scissor-like motion. Specification, page 4, lines 17-30 to page 7, lines 1-20. When the coupling means is positioned in the bottom portion of the shafts near the grasping heads, the apparatus functions in a manner similar to that of a post hole digger. Figure 2. When it is positioned near the middle or

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 7

top portion of the shafts, the apparatus functions in a manner similar to that of a tong. Figure 1. As noted earlier, the grasping elements can also be rotated about the longitudinal axis of their shafts to permit use of the grasping heads in various angles. Specification, page 4, lines 26-27.

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The first issue before the Board is whether the Examiner erred in rejecting Claims 1-3, 6-9, and 15 under 35 U.S.C. §102(b) as being anticipated by Davis, U.S. Patent No. 318,359.

The second issue before the Board is whether the Examiner erred in rejecting Claims 1, 8, 9, 11, 12, and 15 under 35 U.S.C. 102(b) as being anticipated by Lee, U.S. Patent No. 2,997,328.

The third issue before the Board is whether the Examiner erred in rejecting Claims 1, 8, 9, and 11-15 under 35 U.S.C. 102(b) as being anticipated by Laramie, U.S. Patent No. 4,787,663.

The fourth issue is whether the Examiner erred in rejecting Claims 4, 5, and 10 under 35 U.S.C. 103(a) as being unpatentable over Davis, U.S. Patent No. 318,359, in view of Cox, U.S. Patent No. 3,688,484.

VII. ARGUMENT

1. Summary of Patent Prosecution History

a. Background Prosecution History

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 8

On October 20, 2000, Appellant filed the above-identified application with the USPTO, claiming priority of Provisional Application Number 60/160,660, filed October 21, 1999.

In the August 1, 2001 Office Action, the Examiner rejected all claims 1-12 as presented in the October 20, 2000 application: claims 9-10 were rejected under 35 U.S.C. § 112 while claims 1-12 were rejected under 35 U.S.C. § 103(a).

On October 23, 2001, Appellant filed the Response to August 1, 2001 Office Action that amended the Abstract and claims 9-10 and added new claims 13-15.

In the February 12, 2002 Final Office Action in Response to the October 23, 2001 Amendment, the Examiner rejected claims 1-15 under 35 U.S.C. § 103(a).

On May 13, 2002, Appellant filed a Notice of Appeal from the Examiner to the Board of Patent Appeals and Interferences in Response to February 12, 2002 Final Office Action.

On October 15, 2002, Appellant filed an Appeal Brief, which was filed in a timely manner with necessary petitions for extensions of time to file.

On January 9, 2003, without notice that the Final Action was withdrawn, the Examiner issued an Office Action rejecting all claims 1-15 on different grounds than in the February 12, 2002 Final Office Action.

On January 31, 2003, Appellant filed a response to the Examiner's January 9, 2003 Office Action.

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 9

On August 28, 2003, the Examiner rejected Appellant's arguments and issued a Final Office Action. In that Final Office Action, the Examiner cited references that had not been cited previously "for Applicants examination."

On October 15, 2003, Appellant filed a "Communication in Response to August 28, 2003 Final Office Action," requesting withdrawal of the Final Action and an explanation of the new references, so that a proper response or appeal could be prepared.

On November 14, 2003, the Examiner issued an Advisory Action stating that "The [October 15, 2003] proposed amendment will not be entered because it is not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal." However, it should be noted that Appellant had not presented any proposed amendments. Rather, Appellants had presented arguments in favor of allowance of the pending claims, but the Examiner has failed to substantively respond to the October 15, 2003 Communication.

On December 4, 2003, Appellant submitted a "Communication in Response to August 28, 2003, Final Office Action, Petition for One-Month Extension of Time and Petition for Withdrawal of the Finality of the August 28, 2003 Final Office Action," in which the Examiner was requested to respond on the merits to the October 15, 2003 Communication in Response to the Final Office Action, as required by the Manual of Patent Examining Procedure §707 (f) when rejections are traversed.

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 10

On December 29, 2003, Appellant timely filed a Notice of Appeal. Accordingly, on March 1, 2004, Appellant timely filed an Appeal Brief.

b. Recent Prosecution History

On June 18, 2004, the Examiner reopened prosecution and issued an Office Action rejecting claims 1-15, which are all the claims in the application. Claims 1-3, 6-9, and 11-15 were rejected under 35 U.S.C. 102(b), while claims 4, 5, and 10 were rejected under 35 U.S.C. 103(a). A copy of the June 18, 2004 Office Action is attached hereto as **Exhibit D**.

On September 17, 2004, Appellant responded by submitting a "Communication In Response To June 18, 2004 Office Action." A copy of the September 17, 2004 Communication is attached hereto as **Exhibit C**.

On November 29, 2004, Examiner issued a Final Office Action rejecting claims 1-15, which are all the claims in the application, on the same grounds asserted in the prior Office Action. A copy of the November 29, 2004 Final Office Action is attached hereto as **Exhibit B**.

On February 28, 2005, Appellant responded by submitting a Notice of Appeal and Communication in response to the November 29, 2004 Final Office Action. A copy of the February 29, 2005 Notice of Appeal and Communication is attached hereto as **Exhibit A**. No subsequent action has been received from the Examiner since that submission.

Accordingly, this Appeal Brief is being timely submitted in

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 11

response to the November 29, 2004 Final Office Action.

2. 35 U.S.C. §102(b) Rejection: Anticipation by Davis

The first issue before the Board, under this section, is whether the Examiner erred in rejecting Claims 1-3, 6-9, and 15 under 35 U.S.C. §102(b) as being anticipated by Davis '359 (Davis). A copy of the Davis reference is attached hereto as **Exhibit E**.

35 U.S.C. § 102 provides the basis for all anticipation rejections. In particular, 35 U.S.C. § 102(b) provides that:

A person shall be entitled to a patent unless -
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

To anticipate a claim, the reference must teach each and every element of the claim.

"A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as is contained in the claim." Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989).

Examiner states that "Claims 1-3, 6-9 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Davis '359"

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 12

(Davis). Claim 1 is the sole independent claim, with Claims 2-3, 6-9, and 15 depending either directly or indirectly therefrom. Consequently, the claims rejected under this section will stand or fall together with Claim 1. Therefore, Claim 1 will be the focus of the analysis on this ground of rejection.

Claim 1 provides:

An apparatus for gathering, picking up and carrying materials comprising

a) two grasping elements which each have shafts with grasping means at one end, and

b) a flexible coupling means which can be moved along the shafts of the grasping elements to connect them together while permitting each of them to rotate along the axes of their shafts and to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other.

Davis discloses a post-hole digger which employs two grasping elements with shafts and grasping means (shovels) at one end. Davis, Figures 1-3. It also has a sliding clamp, which is fabricated from malleable iron. Davis, lines 39-41. Appellant asserts that Davis cannot anticipate Claim 1, since Davis fails to disclose, *inter alia*, a "flexible coupling means." However, Examiner takes the position that "Webster defines 'malleable' as being flexible," and thus, the "malleable iron" clamp of Davis means that it is a "flexible" iron clamp, anticipating the flexible coupling means of Claim 1. Appellant respectfully disagrees.

It is improper to ascertain the true meaning of a term by looking only to the meaning of its individual components and then arriving at a definition by performing a mere summation of the meaning of its components. Here, Examiner looked at

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 13

"malleable" in isolation of its surroundings and summarily assigned it a meaning without regard to context. The "malleable iron" of Davis is a term of art as opposed to an adjective (e.g., malleable) merely modifying a noun (e.g., iron). In other words, "malleable iron" is one term even though it consists of two words. With regard to materials, "malleable iron" is used to describe iron with a composition that permits it to be shaped by a hammer (or mallet, hence malleable), as compared with ordinary cast iron which can shatter when struck by a hammer. Since malleable iron is not brittle like some forms of iron, it was preferred in the time of Davis, and still is, for high impact uses, such as in hammers, pickaxes, and shovels. Therefore, it was the material of choice for Davis who needed a tough, hard, inflexible material for his shovels and for the clamp to join the shovels of his post-hole digger.

Webster's Third New International Dictionary of the English Language, Unabridged defines "malleable iron" as follows:

"Malleable iron, also malleable cast iron. n.: cast iron containing usually from 2 to 3 percent carbon and 1.5 to 0.8 percent silicon and produced by annealing white cast iron of this composition in order to convert hard brittle cementite to graphite in modular form so that the material will have greater ductility than white iron or ordinary gray iron containing graphite in flake form."

The USPTO recognizes malleable metal as a type of treated metal, such as iron; see the USPTO Patent Classification Glossary for Class 148, "Treated Metal." Additionally, the USPTO has recognized "malleable iron" as a distinct type of treated metal in issued patents, such as Ferra et al., Method of preparing high nodule malleable iron and its named product, US 6,024,804, Feb. 4, 2000, where various forms of iron are

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 14

described in detail. A search of that issued patent reveals that the word "flexible" is not used once in the entire patent.

Based upon the foregoing, Appellant respectfully submits that the "malleable iron" clamp of Davis is hard and rigid, and cannot be considered flexible within the meaning of Claim 1. Davis uses a rigid clamp to firmly hold the specially shaped shafts of his device in the single configuration that is useful as a post-hole digger. When the device of Davis is assembled for use, the square shaft of one shovel is held in a square sleeve that forms one part of the coupling. The special crooked square shaft of the other shovel is held in another square sleeve, of which one side is closed by a metal rod, which permits this shovel to pivot in opposition to the other shovel. The square cross-section of the clamp sleeves prevents rotation of the shovels about the axes of their shafts when the clamp is in position to serve its useful purpose. Once the shovels are driven into the ground for digging, the clamp must be unyielding enough to enable leverage to be exerted on the pivoting handle to force the shovels to move toward each other and grasp the earth between them for removal. Thus, to function in its intended manner, the Davis device must have a rigid and unyielding clamp.

From the foregoing, it is clear that Davis lacks the "flexible coupling" element of Claim 1. Accordingly, since Davis fails to disclose every element of Claim 1, there cannot be any anticipation under 35 U.S.C. 102(b).

Nevertheless, Examiner additionally states that "Davis shows the coupling means being moveable along the grasping means

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 15

shafts (as seen between figures 1 and 2) and because the top portions of the Davis handles are rounded, they can inherently rotate about their shaft axis while the coupling means is located at this rounded portion." Appellant respectfully disagrees.

Claim 1 provides a "coupling means which can be moved along the shafts of the grasping elements to connect them together **while** permitting each of them to rotate along the axes of their shafts **and** to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other." In contrast, the sliding clamp of Davis does not permit the handles there to rotate along the axes of their shafts and to pivot with respect to each other.

The sliding clamp of Davis only permits pivoting when it is situated at the bottom of the pivoting handle. And while the top rounded portion of the handles would allow both handles to rotate along the axes of their shafts when the sliding clamp is located in that portion, the handles would not be able to pivot to allow the spades to move together or apart. This is because the sliding clamp of Davis only permits movement of the pivoting arm in one, fixed direction. Consequently, when the sliding clamp is located in the top rounded portion of the handles, the handles have essentially no range of motion since they are permitted only one plane of motion and cannot move in a "scissor" motion past each other (as in Appellant's invention) to allow the spades to be brought together or moved apart.

Examiner has failed to show how Davis anticipates every element of Claim 1. Accordingly, a rejection of Claims 1-3,

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 16

6-9, and 15 based on anticipation is improper. In light of the foregoing reasons, Appellant respectfully requests the Board to reverse this ground of rejection under 35 U.S.C. 102(b).

3. 35 U.S.C. §102(b) Rejection: Anticipation by Lee

The second issue before the Board is whether the Examiner erred in rejecting Claims 1, 8, 9, 11, 12, and 15 under 35 U.S.C. 102(b) as being anticipated by Lee '328 (Lee). A copy of the Lee reference is attached hereto as **Exhibit F**.

As stated in the previous section, "A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

Examiner states that "Claims 1, 8, 9, 11, 12 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Lee '328" (Lee). Claim 1 is the sole independent claim, with Claims 8, 9, 11, 12, and 15 depending either directly or indirectly therefrom. Consequently, the claims rejected under this section will stand or fall together with Claim 1. Therefore, Claim 1 will be the focus of the analysis on this ground of rejection. Claim 1, in its entirety, has been provided supra in the discussion regarding Davis.

Lee discloses a device comprising two chopsticks that are connected at their outer ends by an elastic spring. Lee, Figures 1-2. However, Lee fails to disclose the "two grasping

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 17

elements which each have shafts with **grasping means** at one **end**" of Claim 1. Claim 1 clearly states that the two grasping elements have shafts **and** grasping means at one end. In one embodiment, Appellant discloses that the grasping means may be tines arrayed at one end of the shafts so as to form a rake. Specification, Figures 1-2. In contrast, Lee merely discloses the two chopsticks having only a shaft and no grasping means at one end.

Appellant emphasizes the significance of the limitation of Claim 1, "shafts with grasping means at one end." It may be argued that the chopsticks of Lee have shafts and ends that inherently constitute grasping means. However, such an assertion would eviscerate the explicit limitation of Claim 1. Claim 1 clearly indicates that, in addition to the shafts, there is an additional element at the end of each shaft to provide a means for grasping. Appellant has disclosed that, in one embodiment, the grasping means may be tines arrayed in similar fashion to that of a rake. Specification, page 3, lines 19-20. In another embodiment, Appellant discloses that the grasping means may be a broad scoop or blade, like that of a shovel. Specification, page 5, lines 21-22. These embodiments are merely exemplary and are not intended to limit the scope of "grasping means" as disclosed in Appellant's Specification.

In light of Appellant's disclosure and the plain meaning of Claim 1, the "shafts with grasping means at one end" of requires, at a minimum, an element at one end of the shaft that provides a means for grasping in addition to the shaft itself, although they need not be physically separate from the shaft, as in a wooden spoon-like tool. While two poles may be

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 18

"shafts" and two rakes or shovels may be "shafts with grasping means at one end," and both may be used to manipulate objects with differing degrees of efficiency, it would be improper to conclude that the poles anticipate the rakes or shovels. To do so would equate "shafts" and "shafts with grasping means at one end," thus rendering the additional limitation "with grasping means at one end" meaningless.

Examiner has failed to show how Lee anticipates every element of Claim 1. Accordingly, a rejection of Claims 1, 8, 9, 11, 12, and 15 based on anticipation is improper. In light of the foregoing reasons, Appellant respectfully requests the Board to reverse this ground of rejection under 35 U.S.C. 102(b).

4. 35 U.S.C. §102(b) Rejection: Anticipation by Laramie

The third issue before the Board is whether the Examiner erred in rejecting Claims 1, 8, 9, and 11-15 under 35 U.S.C. 102(b) as being anticipated by Laramie '663 (Laramie). A copy of the Laramie reference is attached hereto as **Exhibit G**.

As stated in the two previous sections, "A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

Examiner states that "Claims 1, 8, 9, and 11-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Laramie '663" (Laramie). Claim 1 is the sole independent claim, with Claims 8, 9, and 11-15 depending either directly or indirectly

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 19

therefrom. Consequently, the claims rejected under this section will stand or fall together with Claim 1. Therefore, Claim 1 will be the focus of the analysis on this ground of rejection. Claim 1, in its entirety, has been provided supra in the discussion regarding Davis.

Laramie discloses a chopstick holder capable of holding a pair of chopsticks so as to facilitate their use. However, Laramie fails to disclose the "two grasping elements which each have shafts with **grasping means** at one **end**" of Claim 1. Claim 1 clearly states that the two grasping elements have shafts **and** grasping means at one end. As noted previously, in one embodiment, Appellant discloses that the grasping means may be tines arrayed at one end of the shafts so as to form a rake. Specification, Figures 1-2. In contrast, Laramie merely discloses the two chopsticks having only a shaft and no grasping means at one end.

As discussed in the previous issue, Appellant emphasizes the significance of the limitation of Claim 1, "shafts with grasping means at one end." It may be argued that the chopsticks of Laramie have shafts and ends that inherently constitute grasping means. However, such an assertion would eviscerate the explicit limitation of Claim 1. Claim 1 clearly indicates that, in addition to the shafts, there is an additional element at the end of each shaft to provide a means for grasping. Appellant has disclosed that, in one embodiment, the grasping means may be tines arrayed in similar fashion to that of a rake. Specification, page 3, lines 19-20. In another embodiment, Appellant discloses that the grasping means may be a broad scoop or blade, like that of a shovel. Specification, page 5, lines 21-22. These

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 20

embodiments are merely exemplary and are not intended to limit the scope of "grasping means" as disclosed in Appellant's Specification.

In light of Appellant's disclosure and the plain meaning of Claim 1, the "shafts with grasping means at one end" of requires, at a minimum, an element at one end of the shaft that provides a means for grasping in addition to the shaft itself, although they need not be physically separate from the shaft, as in a wooden spoon-like tool. While two poles may be "shafts" and two rakes or shovels may be "shafts with grasping means at one end," and both may be used to manipulate objects with differing degrees of efficiency, it would be improper to conclude that the poles anticipate the rakes or shovels. To do so would equate "shafts" and "shafts with grasping means at one end," thus rendering the additional limitation "with grasping means at one end" meaningless.

Furthermore, Laramie fails to disclose "flexible coupling means" that permits rotation of the shafts about their longitudinal axes. Rather, Laramie teaches that the chopsticks are "firmly held" by the holder, and that the ability of the chopsticks to rotate around the axes of their shafts is restricted by the friction fit of the chopsticks in the through holes of the chopstick holder. Laramie, Abstract and column 4, lines 11-12. Laramie also teaches the use of splines in the through holes to prevent rotation of the chopsticks. Laramie, column 4, lines 28-31.

In sum, Laramie fails to disclose "shafts with grasping means at one end" and "flexible coupling means" that permit rotation of the shafts about their longitudinal axes. Therefore,

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 21

Examiner has failed to show how Laramie anticipates every element of Claim 1. Accordingly, a rejection of Claims 1, 8, 9, 11, 12, and 15 based on anticipation is improper. In light of the foregoing reasons, Appellant respectfully requests the Board to reverse this ground of rejection under 35 U.S.C. 102(b).

5. 35 U.S.C. §103(a) Rejection: Obviousness in light of Davis and Cox

The basis for all obviousness rejections is set forth under 35 U.S.C. § 103(a), which provides:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The examiner bears the initial burden of factually supporting any prima facie conclusion of obviousness. In re Bell, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) (citing In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988)). If the examiner does not produce a prima facie case, the applicant is under no obligation to submit evidence of nonobviousness. Manual of Patent Examining Procedure, §2142.

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 22

knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references (or references when combined) must teach or suggest all the claim limitations. Manual of Patent Examining Procedure, §2143.

Examiner states that "Claims 4, 5 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davis '359 in view of Cox '484" (Cox). A copy of the Cox reference is attached hereto as **Exhibit H**. Claim 4 depends on independent Claim 1. Claim 5 further depends on dependent Claim 4. Claim 10 depends on Claim 8, which in turn, depends on Claim 1.

Examiner states that "[i]t would have been obvious to one having ordinary skill in the art at the time of the invention to provide the device of Davis with the teachings of Cox in order to provide a grasping device having greater operational range (i.e., use for better grasping lawn debris, etc.)." The disclosure of Davis has already been discussed in the earlier section addressing Examiner's rejection under 35 U.S.C. §102(b). In that section, Appellant discussed how Davis fails to teach all the limitations of Claim 1.

As discussed supra, Davis fails to disclose "a **flexible** coupling means which can be moved along the shafts of the grasping elements to connect them together **while** permitting each of them to rotate along the axes of their shafts **and** to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other." Cox discloses two elongated handles which are connected at a central point by a pivot pin, with each handle having a fixed

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 23

rake head. Thus, the coupling means (pivot pin) of Cox is neither flexible nor does it permit rotation of the handles along the axes of their shafts.

Accordingly, Davis and Cox, when combined, fail to teach all the limitations of Claim 1, and thus, necessarily fail to teach all the limitations of Claims 4, 5, 10 since these claims have all the elements of Claim 1 in addition to further elements. In particular, Claims 4 and 5 restrict the grasping elements of Claim 1, while Claim 10 restricts the coupling means of Claim 1 (through dependence on Claim 8). Therefore, Examiner has not satisfied this criterion of a prima facie case, and it is unnecessary for Appellant to address the remaining criteria of motivation to combine and reasonable expectation of success.

It should be noted that independent Claim 1 was not rejected under 35 U.S.C. 103(a), although narrower Claims 4, 5, and 10, which depend directly and indirectly therefrom, were rejected. Examiner's failure to reject Claim 1, the broadest pending claim, suggests a concession that Claim 1 is not obvious in view of Davis and Cox. Thus, a rejection of dependent Claims 4, 5, and 10 is inconsistent with the concession of the non-obviousness of independent Claim 1. To deem independent Claim 1 as non-obvious, while rejecting dependent Claims 4, 5, and 10 as obvious, is to improperly focus on the shovels and rakes shown in the references and to summarily ignore the novel and non-obvious combination of the claimed invention.

As discussed above, Examiner has not fulfilled his burden of establishing a prima facie case of obviousness. Accordingly, a rejection of Claims 4, 5, and 10 based on obviousness is

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000
Page : 24

improper. In light of the foregoing reasons, Appellant respectfully requests the Board to reverse this ground of rejection under 35 U.S.C. 103(a).

In conclusion and for reasons stated above, Appellant respectfully submits that the Examiner has failed to establish how the cited references anticipate the pending claims under 35 U.S.C. § 102(b). Additionally, the Examiner has failed to satisfy his burden of proof with regard to establishing a prima facie case of obviousness against the pending claims under 35 U.S.C. § 103(a).

Appellant respectfully requests the Board to reverse the Examiner's rejections under 35 U.S.C. §§ 102(b) and 103(a). Appellant also respectfully requests that the above remarks be entered and made of record in the present application. An allowance of the pending claims is earnestly requested.

If a telephone interview would be of assistance in advancing prosecution of the subject application, Appellant's undersigned attorney invites the Examiner to telephone at the number provided below.

Respectfully submitted,

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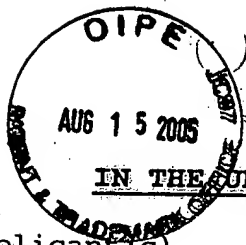
Albert Wai-Kit Chan 8/11/05
Albert Wai-Kit Chan Date
Reg. No. 36,479

BEST AVAILABLE COPY

What is claimed is:

1. An apparatus for gathering, picking up and carrying materials comprising
 - a) two grasping elements which each have shafts with grasping means at one end, and
 - b) a flexible coupling means which can be moved along the shafts of the grasping elements to connect them together while permitting each of them to rotate along the axes of their shafts and to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other.
2. An apparatus as in claim 1, wherein the grasping elements have shafts with diameters of 0.5 to 3 inches.
3. An apparatus as in claim 1, wherein the grasping elements have shafts with lengths of two to six feet.
4. An apparatus as in claim 1, wherein each grasping element has a grasping head that consists of tines arrayed to form a rake.
5. An apparatus as in claim 4, wherein the grasping elements are commercially available garden rakes for raking leaves, dirt or other materials.
6. An apparatus as in claim 1, wherein each grasping element has a grasping head fabricated as the head of a shovel from sheets of metal, wood or plastic that extend along the axes of the shafts for three to eighteen inches and extend sidewise equally on both sides of the shaft for a total width of three to twenty four inches.
7. An apparatus as in claim 6, wherein the grasping elements are commercially available shovels for shoveling dirt, snow or other materials.

8. An apparatus as in claim 1, wherein the coupling means consists of two loops that have diameters slightly larger than the diameters of the shafts to be connected and said loops are connected by a flexible linkage means having a length of one fourth to 4 inches.
9. An apparatus as in claim 8, wherein the entire coupling means is molded of, or cut from, sheets of an inherently flexible material.
10. An apparatus as in claim 8, wherein the flexible linkage of the coupling means is made of rigid material fabricated in the form of a chain to impart flexibility.
11. An apparatus as in claim 8, wherein the coupling means comprises loops of material that are connected by flexible material in the form of a band.
12. An apparatus as in claim 8, wherein the loops of the coupling means contain clamping devices that permit them to be moved along the shafts to a desired position and then clamped there to prevent further unwanted movement.
13. An apparatus as in claim 8, wherein the coupling material is rubber.
14. An apparatus as in claim 8, wherein the coupling material is plastic.
15. An apparatus as in claim 8, wherein the coupling material is metal.



Dkt. #683

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239 Examiner: Robert Pezzuto
Filed : October 20, 2000 Art Unit: 3671
For : APPARATUS FOR GATHERING, PICKING UP AND
CARRYING LOOSE MATERIALS

Law Offices of Albert Wai-Kit Chan, LLC
World Plaza, Suite 604
141-07 20th Avenue
Whitestone, NY 11357

February 28, 2005

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir/Madam:

**NOTICE OF APPEAL FROM THE EXAMINER TO THE BOARD OF PATENT
APPEALS AND INTERFERENCES AND COMMUNICATION IN RESPONSE TO
NOVEMBER 29, 2004 FINAL OFFICE ACTION**

This Notice of Appeal and Communication is submitted in response to the November 29, 2004, a Final Office Action which was issued by the United States Patent and Trademark Office (USPTO) in connection with the above-identified application. The three-month shortened statutory period for reply is set to expire on February 29, 2005. However, because this is not a leap year, and thus, there is no February 29, 2005, a response to the November 29, 2004 Final Office Action is due February 28, 2005. Manual of Patent Examining Procedure, Section 710.01(a). Accordingly, this Notice of Appeal and Communication are timely filed.

Applicant hereby submit a Notice of Appeal and Communication in response to the November 29, 2004 Final Office Action issued by

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 2

the USPTO in connection with the above-identified application. The Notice of Appeal from the Examiner to the Board of Patent Appeals and Interferences is attached herein as Exhibit A (1 page, in duplicate).

The required fee for a Notice of Appeal is TWO HUNDRED AND FIFTY DOLLARS (\$250.00) for a small entity. However, on December 29, 2003, Applicant already submitted a check in the amount of ONE HUNDRED AND SIXTY-FIVE DOLLARS (\$165.00), the required fee at the time for a Notice of Appeal. Accordingly, no fee for the Notice of Appeal is due since the required fee was already paid. 35 U.S.C. 134(a) ("An applicant for a patent . . . may appeal . . . having once paid the fee for such appeal.").

REMARKS

Response to rejection of Claims 1-3, 6-9, and 15 under 35 U.S.C. §102(b) as being anticipated by Davis '359.

Examiner states that "Claims 1-3, 6-9 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Davis '359" (Davis). Claim 1 is the sole independent claim, with Claims 2-3, 6-9, and 15 depending either directly or indirectly therefrom. Consequently, the claims rejected under this section will stand or fall together with Claim 1. Therefore, Claim 1 will be the focus of the analysis on this ground of rejection. Applicant respectfully traverses this ground of rejection for the reasons stated below.

To anticipate a claim, the reference must teach each and every

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 3

element of the claim.

"A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 2USPQ2d 111051, 1053 (Fed. Cir. 1987). The identical invention must be shown in as complete detail as is contained in the claim." Richardson v. Suzuki Motor Co., 9USPQ2d 1913, 1920 (Fed. Cir. 1989).

Claim 1 provides:

An apparatus for gathering, picking up and carrying materials comprising

- a) two grasping elements which each have shafts with grasping means at one end, and
- b) a flexible coupling means which can be moved along the shafts of the grasping elements to connect them together while permitting each of them to rotate along the axes of their shafts and to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other.

Davis discloses a post-hole digger which employs two grasping elements with shafts and grasping means (shovels) at one end. It also has a sliding clamp, which is fabricated from malleable iron. Applicant asserts that Davis cannot anticipate Claim 1, since Davis fails to disclose, *inter alia*, a "flexible coupling means." However, Examiner takes the position that "Webster defines 'malleable' as being flexible," and thus, the "malleable iron" clamp of Davis means that it is a "flexible" iron clamp, anticipating the flexible coupling means of Claim 1. Applicant respectfully disagrees.

It is improper to ascertain the true meaning of a term by looking only to the meaning of its individual components and

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 4

then arriving at a definition by performing a mere summation of the meaning of its components. Here, Examiner looked at "malleable" in isolation of its surroundings and summarily assigned it a meaning without regard to context. The "malleable iron" of Davis is a term of art as opposed to an adjective (e.g., malleable) merely modifying a noun (e.g., iron). In other words, "malleable iron" is one term even though it consists of two words. With regard to materials, "malleable iron" is used to describe iron with a composition that permits it to be shaped by a hammer (or mallet, hence malleable), as compared with ordinary cast iron which can shatter when struck by a hammer. Since malleable iron is not brittle like some forms of iron, it was preferred in the time of Davis, and still is, for high impact uses, such as in hammers, pickaxes, and shovels. Therefore, it was the material of choice for Davis who needed a tough, hard, inflexible material for his shovels and for the clamp to join the shovels of his post-hole digger.

Webster's Third New International Dictionary of the English Language, Unabridged defines "malleable iron" as follows:

"Malleable iron, also malleable cast iron. n.: cast iron containing usually from 2 to 3 percent carbon and 1.5 to 0.8 percent silicon and produced by annealing white cast iron of this composition in order to convert hard brittle cementite to graphite in modular form so that the material will have greater ductility than white iron or ordinary gray iron containing graphite in flake form."

The USPTO recognizes malleable metal as a type of treated metal, such as iron; see the USPTO Patent Classification Glossary for Class 148, "Treated Metal". Additionally, the USPTO has recognized "malleable iron" as a distinct type of

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 5

treated metal in issued patents, such as Ferra et al., Method of preparing high nodule malleable iron and its named product, US 6,024,804, Feb. 4, 2000, where various forms of iron are described in detail. A search of that issued patent reveals that the word "flexible" is not used once in the entire patent.

Based upon the foregoing, Applicant respectfully submits that the "malleable iron" clamp of Davis is hard and rigid, and cannot be considered flexible within the meaning of Claim 1. Davis uses a rigid clamp to firmly hold the specially shaped shafts of his device in the single configuration that is useful as a post-hole digger. When the device of Davis is assembled for use, the square shaft of one shovel is held in a square sleeve that forms one part of the coupling. The special crooked square shaft of the other shovel is held in another square sleeve, of which one side is closed by a metal rod, which permits this shovel to pivot in opposition to the other shovel. The square cross-section of the clamp sleeves prevents rotation of the shovels about the axes of their shafts when the clamp is in position to serve its useful purpose. Once the shovels are driven into the ground for digging, the clamp must be unyielding enough to enable leverage to be exerted on the pivoting handle to allow the shovels to break apart and grasp the displaced earth for removal. Thus, to function in its intended manner, the Davis device must have a rigid and unyielding clamp.

From the foregoing, it is clear that Davis lacks the "flexible coupling" element of Claim 1. Accordingly, since Davis fails to disclose every element of Claim 1, there cannot be any

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 6

anticipation under 35 U.S.C. 102(b).

Nevertheless, Examiner additionally states that "Davis shows the coupling means being moveable along the grasping means shafts (as seen between figures 1 and 2) and because the top portions of the Davis handles are rounded, they can inherently rotate about their shaft axis while the coupling means is located at this rounded portion." Applicant respectfully disagrees.

Claim 1 provides a "coupling means which can be moved along the shafts of the grasping elements to connect them together while permitting each of them to rotate along the axes of their shafts and to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other." In contrast, the sliding clamp of Davis does not permit the handles there to rotate along the axes of their shafts and to pivot with respect to each other.

The sliding clamp of Davis only permits pivoting when it is situated at the bottom of the pivoting handle. And while the top rounded portion of the handles would allow both handles to rotate along the axes of their shafts when the sliding clamp is located in that portion, the handles would not be able to pivot to allow the spades to move together or apart. This is because the sliding clamp of Davis only permits movement of the pivoting arm in one, fixed direction. Consequently, when the sliding clamp is located in the top rounded portion of the handles, the handles have essentially no range of motion since they are permitted only one plane of motion and cannot move in a "scissor" motion past each other (like Applicant's

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 7

invention) to allow the spades to be brought together or moved apart.

In light of the foregoing reasons, Applicant respectfully traverses this ground of rejection under 35 U.S.C. 102(b). Examiner fails to show how Davis anticipates every element of Claim 1. Accordingly, a rejection of Claims 1-3, 6-9, and 15 based on anticipation is improper.

Response to rejection of Claims 1, 8, 9, 11, 12, and 15 under
35 U.S.C. §102(b) as being anticipated by Lee '328

Examiner states that "Claims 1, 8, 9, 11, 12 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Lee '328" (Lee). Claim 1 is the sole independent claim, with Claims 8, 9, 11, 12, and 15 depending either directly or indirectly therefrom. Consequently, the claims rejected under this section will stand or fall together with Claim 1. Therefore, Claim 1 will be the focus of the analysis on this ground of rejection. Applicant respectfully traverses this ground of rejection for the reasons stated below.

As stated in the previous section, "A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 2USPQ2d 111051, 1053 (Fed. Cir. 1987).

Lee discloses a device comprising two chopsticks that are connected at their outer ends by an elastic spring. However, Lee fails to disclose the "two grasping elements which each

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 8

have shafts with *grasping means* at one *end*" of Claim 1. Claim 1 clearly states that the two grasping elements have shafts and grasping means at one end. Lee merely discloses the two chopsticks having only a shaft and no grasping means at one end.

In light of the foregoing reasons, Applicant respectfully traverses this ground of rejection under 35 U.S.C. 102(b). Examiner fails to show how Lee anticipates every element of Claim 1. Accordingly, a rejection of Claims 1, 8, 9, 11, 12, and 15 based on anticipation is improper.

Response to rejection of Claims 1, 8, 9, and 11-15 under 35
U.S.C. §102(b) as being anticipated by Laramie '663

Examiner states that "Claims 1, 8, 9, and 11-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Laramie '663" (Laramie). Claim 1 is the sole independent claim, with Claims 8, 9, and 11-15 depending either directly or indirectly therefrom. Consequently, the claims rejected under this section will stand or fall together with Claim 1. Therefore, Claim 1 will be the focus of the analysis on this ground of rejection. Applicant respectfully traverses this ground of rejection for the reasons stated below.

As stated in the two previous sections, "A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 2USPQ2d 111051, 1053 (Fed. Cir. 1987).

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 9

Laramie discloses a chopstick holder capable of holding a pair of chopsticks so as to facilitate their use. However, Laramie fails to disclose the "two grasping elements which each have shafts with *grasping means* at one end" of Claim 1. Claim 1 clearly states that the two grasping elements have shafts *and* grasping means at one end. Laramie merely discloses the two chopsticks having only a shaft and no grasping means at one end.

In light of the foregoing reasons, Applicant respectfully traverses this ground of rejection under 35 U.S.C. 102(b). Examiner fails to show how Laramie anticipates every element of Claim 1. Accordingly, a rejection of Claims 1, 8, 9, 11, 12, and 15 based on anticipation is improper.

Response to rejection of claims 4, 5, and 10 under
35 U.S.C. §103(a) as being unpatentable over Davis '359 in
view of Cox '484

Examiner states that "Claims 4, 5 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davis '359 in view of Cox '484" (Cox). Claim 4 depends on independent Claim 1. Claim 5 further depends on dependent Claim 4. Claim 10 depends on Claim 8, which in turn, depends on Claim 1. Accordingly, Claims 4, 5, and 10 represent different embodiments of the claimed apparatus, and thus, include further limitations to independent Claim 1. Therefore, Claims 4, 5, and 10 stand alone. Applicant respectfully traverses the above-mentioned ground of rejection for the reasons stated below.

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 10

The basis for all obviousness rejections is set forth under 35 U.S.C. § 103(a), which provides:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art references (or references when combined) must teach or suggest all the claim limitations. Manual of Patent Examining Procedure, §2143.

Examiner states that "[i]t would have been obvious to one having ordinary skill in the art at the time of the invention to provide the device of Davis with the teachings of Cox in order to provide a grasping device having greater operational range (i.e., use for better grasping lawn debris, etc.)." The disclosure of Davis has already been discussed in the earlier section addressing Examiner's rejection under 35 U.S.C. §102(b). In that section, Applicant discussed how Davis fails to teach all the limitations of Claim 1.

As discussed *supra*, Davis fails to disclose "a *flexible*

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 11

coupling means which can be moved along the shafts of the grasping elements to connect them together *while* permitting each of them to rotate along the axes of their shafts *and* to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other." Cox discloses two elongated handles which are connected at a central point by a pivot pin, with each handle having a fixed rake head. Thus, the coupling means (pivot pin) of Cox is neither flexible nor does it permit rotation of the handles along the axes of their shafts.

Accordingly, Davis and Cox, when combined, fail to teach all the limitations of Claim 1, and thus, necessarily fail to teach all the limitations of Claims 4, 5, 10 since these claims depend either directly or indirectly on Claim 1 and only include additional limitations. Therefore, Examiner has not satisfied this criteria of the *prima facie* case, and it is unnecessary for Applicant to address the remaining criteria of motivation to combine and reasonable expectation of success.

In light of the foregoing reasons, Applicant respectfully traverses this ground of rejection under 35 U.S.C. 103(a). Examiner has not fulfilled his burden of establishing a *prima facie* case of obviousness. Accordingly, a rejection of Claims 4, 5, and 10 based on obviousness is improper.

CONCLUSION

For the above reasons, Applicant respectfully requests that the above remarks be entered and made of record in the present application. An allowance is earnestly requested.

Applicant(s) : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filed : October 20, 2000
Page : 12

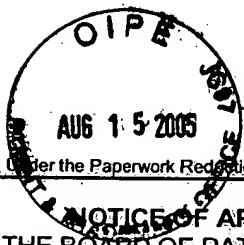
If a telephone interview would be of assistance in advancing the prosecution of the subject application, Applicant's undersigned attorney invites the Examiner to telephone him at the number provided below.

As discussed *supra*, no fee is deemed necessary in connection with the filing of this Notice of Appeal and Communication. However, if any additional fee is required, authorization is hereby given to charge the amount of any such fee to Deposit Account No. 50-1891.

Respectfully submitted,

Albert Wai Kit Chan

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**NOTICE OF APPEAL FROM THE EXAMINER TO
THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Docket Number (Optional)

683

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In re Application of

Herbert Howell WADDELL

Application Number

09/693,239

Filed

October 20, 2000

For APPARATUS FOR GATHERING, PICKING UP AND CARRYING
LOOSE MATERIALS

Art Unit

3671

Examiner

Pezzuto, Robert Eric

Applicant hereby appeals to the Board of Patent Appeals and Interferences from the last decision of the examiner.

The fee for this Notice of Appeal is (37 CFR 41.20(b)(1))

\$ 500.00

- ☒ Applicant claims small entity status. See 37 CFR 1.27. Therefore, the fee shown above is reduced by half, and the resulting fee is: \$ 250.00
- ☐ A check in the amount of the fee is enclosed.
- ☐ Payment by credit card. Form PTO-2038 is attached.
- ☐ The Director has already been authorized to charge fees in this application to a Deposit Account. I have enclosed a duplicate copy of this sheet.
- ☒ The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. 50-1891. I have enclosed a duplicate copy of this sheet.
- ☐ A petition for an extension of time under 37 CFR 1.136(a) (PTO/SB/22) is enclosed.

WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.

I am the

- ☐ applicant/inventor.
- ☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/96)
- ☒ attorney or agent of record.
Registration number 36,479
- ☐ attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34. _____

Albert Wai Kit Chan
Signature

Albert Wai-Kit Chan

Typed or printed name

(718) 357-8836

Telephone number

February 28, 2005

Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

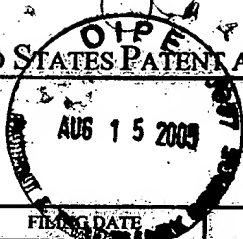
☒ *Total of 2 forms are submitted.

This collection of information is required by 37 CFR 41.31. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/693,239	10/20/2000	Herbert Howell Waddell	IP-902 ?	8560

7590

11/29/2004

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EXAMINER

PEZZUTO, ROBERT ERIC

ART UNIT	PAPER NUMBER
3671	

DATE MAILED: 11/29/2004

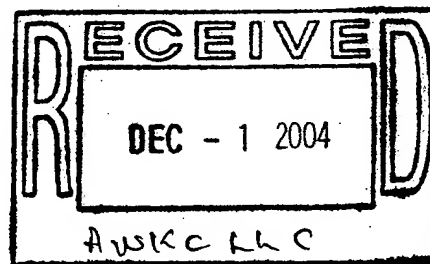
2/28/05 - ROA (3 mos)

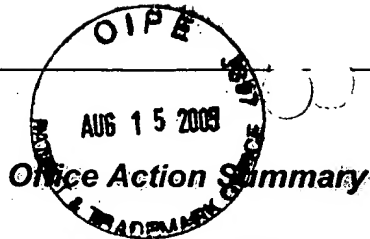
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Please find below and/or attached an Office communication concerning this application or proceeding.

pay
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Application No.

09/693,239

Applicant(s)

WADDELL, HERBERT HOWELL

Examiner

Robert E Pezzuto

Art Unit

3671

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 September 2004.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- 1) ☐ Certified copies of the priority documents have been received.
 - 2) ☐ Certified copies of the priority documents have been received in Application No. _____.
 - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|-----------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date. _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 6-9 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Davis '359. Davis discloses an apparatus capable of gathering, picking up and carrying materials (figures 1-4) comprising two grasping elements (shovels, as seen in figures 1-3) each having shafts (A,A') and a flexible coupling means C (Davis states on lines 40 and 41 that C is "made of malleable iron" and *Webster* defines "malleable" as being *flexible*). Also, Davis shows the coupling means being moveable along the grasping means shafts (as seen between figures 1 and 2) and because the top portions of the Davis handles are rounded, they can inherently rotate about their shaft axis while the coupling means is located at this rounded portion. Further, Davis shows the diameter of the shafts to be between 0.5 and 3 inches and shows their length to be between two and six feet.

Art Unit: 3671

Claims 1, 8, 9, 11, 12 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Lee '328. Lee discloses an apparatus for picking up and carrying materials (figures 1-3) comprising two grasping elements A which each have shafts 15 and a flexible coupling means (metal spring means 17) having a pair of loops (as seen in figure 3) which is slideable along the shafts, can allow the shafts to rotate about their axes and is clampable in desired positions.

Claims 1, 8, 9 and 11-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Laramie '663. Laramie discloses an apparatus for picking up and carrying materials (figures 1-7) comprising two grasping elements (12,14) which each have shafts (as seen in figure 1) and a flexible coupling means (being formed from "any resilient material...plastic, etc; column 3, lines 59-62) having a pair of loops (as seen in figure 3) which is slideable along the shafts, can allow the shafts to rotate about their axes and is clampable in desired positions.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4, 5 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davis '359 in view of Cox '484. Davis discloses the claimed device substantially as discussed above but fails to show the use of rakes. However, Cox teaches that it is well known to provide rakes in such a grasping configuration and to do so using a diverse hinge means rendering the claimed chain an art recognized equivalent and an obvious matter of choice of design. It would have been obvious to one having ordinary skill in the art at the time of the invention to provide the device of Davis with the teachings of Cox in order to provide a grasping device having greater operational range (i.e., use for better grasping lawn debris, etc.).

In reference to applicant's arguments is the following:

Regarding the Davis reference, the term "malleable" and applicant's term "flexible": As mentioned in the Action, the term "malleable" as defined by *Webster* equates directly to the term "flexible". Further, because of the broad claim language employed by the applicant, "a flexible coupling means", and the lack of a point of reference, the coupling of Davis can be employed to anticipated a flexible coupling (for example as opposed to a "welded coupling", "a concrete coupling" or one made from a inherently brittle material; i.e., cast iron).

Regarding the Lee reference: the applicant's attorney goes to great lengths to discuss the applied forces to the bottom of the tools disclosed in Lee. Further, great amounts of discussion are given the "fulcrum" of; and as employed by, Lee. However, none of these items appear to be either claimed by the applicant or germane to the

Art Unit: 3671

claimed features/limitations being anticipated by Lee. Simply put, claim 1 only requires two grasping elements and a flexible coupling between the elements, which would allow the two elements to rotate. Lee clearly has two chopsticks 16 and a coupling 17 between them. The coupling is clearly flexible (as shown in figure 2, plane and phantom views) and since the coupling connecting means "wraps" around the shafts (at no specific point, as seen in figure 3, area of reference numerals 21 7 25) of the sticks, the shafts are capable of being turned within the coupling and about their axes.

Regarding the comments on page 6, paragraph 2 about both Davis and Lee anticipating the applicant's claimed device and therefore Davis anticipates Lee (asserting that Lee should be invalid). This statement is basically erroneous (in that applicant's device can be (and is being) claimed in such a broad manner as to be anticipated by more than one prior art reference) and has nothing to do with the issues at hand.

Regarding the arguments against the Laramie reference: The above response/comments to Lee apply.

Applicant's arguments filed September 20, 2004 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within

Art Unit: 3671

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert E Pezzuto whose telephone number is (703) 308-1012. The examiner can normally be reached on 7:00 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B Will can be reached on (703) 308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 3671

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Robert E Pezzuto
November 24, 2004

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239 Art Unit: 3671
Examiner: Robert Pezzuto
Filed : October 20, 2000
For : APPARATUS FOR GATHERING, PICKING UP AND
CARRYING LOOSE MATERIALS

Law Offices of Albert Wai-Kit Chan, LLC
World Plaza, Suite 604
141-07 20th Avenue
Whitestone, New York 11357

September 17, 2004

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

COMMUNICATION IN RESPONSE TO JUNE 18, 2004 OFFICE ACTION

This Communication is submitted in response to the June 18, 2004 Office Action which was issued by the United States Patent and Trademark Office in connection with the above-identified application. A response to the June 18, 2004 Office Action is due September 18, 2004. Accordingly, this Communication is being timely filed.

REMARKS

Response to rejection of claims 1-3, 6-9 and 15 under 35 USC § 102(b) as being anticipated by Davis '359.

To anticipate a claim, the reference must teach each and every

Applicant () Herbert Howell Waddell ()
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 2

element of the claim.

"A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference."

Verdegaal Bros. v. Union Oil Co. of California, 2USPQ2d 111051, 1053 (Fed. Cir. 1987). The identical invention must be shown in as complete detail as is contained in the claim." Richardson v. Suzuki Motor Co., 9USPQ2d 1913, 1920 (Fed. Cir. 1989).

Claim 1 is the only independent claim, and all others are dependent claims. Therefore, claim 1 contains the elements of the invention which states:

An apparatus for gathering, picking up and carrying materials comprising

- a) two grasping elements which each have shafts with grasping means at one end, and
- b) a flexible coupling means which can be moved along the shafts of the grasping elements to connect them together while permitting each of them to rotate along the axes of their shafts and to pivot with respect to each other so that the grasping heads can be brought together or moved apart from each other.

Davis employs two grasping elements with shafts and grasping means (shovels) at one end. It also has a coupling device, which is fabricated from malleable iron. "Malleable iron" is a "term of art" to describe iron with a composition that permits it to be shaped by a hammer (or mallet, hence malleable). Malleable iron is not brittle like some forms of iron, so was,

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 3

and still is, used for high impact uses, such as in hammers and pickaxes. Webster's New World Dictionary defines malleable iron as "cast iron made from pig iron by long heating at a high temperature and slow cooling: it is especially strong and malleable". The name is still used, as in Ferra et al., Method of preparing high nodule malleable iron and its named product, US 6,024,804, Feb. 4, 2000, where various forms of iron are described in detail. In modern usage, the adjective "malleable" may have different meanings when not part of the "malleable iron" expression, e.g. a malleable personality might be changeable or flexible although it obviously could not be hammered into a new shape. However, it is respectfully submitted that "malleable iron" shaped as in the Davis apparatus is hard and rigid, and cannot be considered flexible in the same way that the applicants coupling is. Davis uses a rigid malleable iron coupling to firmly hold the specially shaped shafts of his device in a single configuration that is useful as a post hole digger. When the device of Davis is assembled for use, the square shaft of one shovel is held in a square sleeve that forms one part of the coupling. The special crooked square shaft of the other shovel is held in a three-sided square sleeve. The fourth side of the sleeve is closed by a metal rod, which permits this shovel to pivot in opposition to the other shovel. The square cross-section of the coupling sleeves prevents rotation of the shovels about the axes of their shafts. To function in its intended manner, the Davis device must have a rigid, unyielding coupling. If the shovels are moved out of their one operating position, they perform no useful function as an apparatus.

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 4

Therefore, Davis lacks several elements of the applicant's invention: 1) the coupling in Davis is not flexible; 2) the coupling cannot connect the grasping elements in many different useful configurations by being moved along the shafts, and; 3) the elements are prevented from rotating along the axes of their shafts when they are in a useful configuration.

Applicant respectfully traverses and submits that this rejection is in error. Since the elements of Davis and the applicant's invention are different, it is respectfully requested that claim 1 be allowed. Furthermore, since the dependent claims of limitation, claims 2, 3, 6-9 and 15, claim elements of a different invention than in Davis, it is respectfully requested that these claims be allowed.

Response to rejection of claims 1, 8, 9, 11, 12 and 15 under 35 USC § 102 (b) as being anticipated by Lee '328.

The Examiner has cited Lee '328 as a primary reference in anticipation of the applicant's invention. As stated earlier, "A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 2USPQ2d 111051, 1053 (Fed. Cir. 1987). Further, as in the argument above regarding Davis, claim 1 is the only independent claim, and all others are dependent claims. Therefore, Applicant can look to claim 1 for the elements of the invention and to the other claims for clarification and limitation. See the statement of claim 1 above for details of the claim.

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 5

Lee employs an elastic spring to provide a bias force between the ends of the shafts (chop sticks) that tends to pull the outer ends of the chop sticks together in opposition to a force applied by the user's fingers that forces the outer ends apart. To function in this manner, the user must use his fingers to form a fulcrum between the upper and lower end of the chop sticks and must also apply force to the lower ends of the chop sticks to draw them together by overcoming the bias force of the spring at the upper ends. The applicant's invention employs a flexible coupling, but not to provide a bias force. Far different from a spring, applicant's coupling can be a metal chain, which is flexible but not extensible or elastic, so cannot provide a bias force over a range of extensions. Applicant's coupling, being essentially inelastic, would not permit the outer ends of the chopsticks to move apart in response to the force applied by the fingers at the inner ends, so the inner ends of the chopsticks could not be drawn together by pivoting the chopsticks around the fulcrum formed by the fingers. Therefore, the chopsticks of Lee would not function if the spring was replaced by a chain or if the spring was moved to the middle or lower ends of the chop stick shafts. The Applicant's coupling functions to hold the shafts of the grasping elements closely together while allowing them to pivot freely with respect to each other and rotate along their axes. If the applicant's coupling was replaced with the spring of the Davis device, the shafts would spread apart, control of the two grasping devices would be lost and the device would not function as intended. The applicant's invention does not employ a fulcrum as in Lee, and would not perform a useful function if a fulcrum was placed between the "flexible coupling" and the

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 6

operator's hands. From this it is clear that the applicant's invention does not employ the elements of Lee and Lee does not employ the elements of the Applicant's invention, so the two inventions are different.

The Examiner has argued that both Davis and Lee anticipate the Applicant's invention, that is, they each define the Applicant's invention. If this is so, Davis must also anticipate Lee, and Lee would be therefore be invalid. However, the validity of an issued patent is presumed, so the patents must be different. Since Applicant can therefore presume that Davis and Lee are different inventions, the Examiner is respectfully requested to state which of these patents anticipates the Applicant's invention.

Alternatively, if Davis is taken to be the primary reference, multiple references can be cited to (1) prove the primary reference has an "enabling disclosure"; (2) explain the meaning of a term used in the primary reference; or (3) show that a characteristic not disclosed in the reference is inherent. MPEP 2131.01. If Lee is cited as a secondary reference for one or more of these reasons, it should be stated in the rejection so that a proper response can be made.

Since Davis is a clearly described invention, one might conclude that Davis has an enabling disclosure. However, if the meaning of "malleable iron" used in Davis's coupling is not clear, as one might assume from the Examiner's assertion that the malleable iron coupling of Davis is flexible, or that a characteristic not disclosed in Davis is inherent, then a

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 7

relevant citation would show that a material generally known to be flexible, such as rubber, could be used as a coupling to make a device with the same function, namely a post hole digger. Alternatively, a citation showing that a malleable iron coupling is inherently flexible would be relevant. However, a citation showing that a flexible coupling not made of malleable iron can be used to make a completely different device that operates on a completely different principle is irrelevant. Since "malleable iron" is a term of art for a rigid, hard form of iron, and since Davis selected it as a hard, rigid coupling material to eliminate flexibility, the characteristic of flexibility is clearly not inferred.

Applicant respectfully traverses and submits that this rejection is in error. Since the elements of Lee and the Applicant's invention are different, it is respectfully requested that claim 1 be allowed. Furthermore, since the dependent claims of limitation, claims 8, 9, 11, 12 and 15, claim elements of a different invention than in Lee, it is respectfully requested that these claims be allowed.

Response to rejection of claims 1, 8, 9, and 11-15 under 35 USC § 102 (b) as being anticipated by Larimie '663.

The Examiner has cited Laramie '663 as a primary reference in anticipation of the Applicant's invention. As stated earlier, "A claim is anticipated only if each and every element as set forward in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v. Union Oil Co. of California, 2USPQ2d 111051, 1053 (Fed. Cir.

Applicant () Herbert Howell Waddell ()
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 8

1987). Further, as in the argument above regarding Davis, claim 1 is the only independent claim, and all others are dependent claims. Therefore, Applicant can look to claim 1 for the elements of the invention and to the other claims for clarification and limitation. See the statement of claim 1 above for details of the claim.

Laramie '825 claims a chopstick holder comprising two

"elongated holding portions having a pair of respective through holes for holding a pair of chopsticks in a generally parallel relationship and with the dimensions of said through holes being such that the chopsticks will be held by frictional engagement when they are inserted into said through holes." (claim 11, column 5, line 1 and claim 9, column 6, line 2) and "connecting means for holding such holding portions a fixed distance apart, and in a generally parallel relationship" (claim 1, column 5, lines 9-11 and claim 9, column 6, lines 10-12).

The elongated holding portions are connected by a web of material (connecting means). The web can be "slightly resilient" or non-resilient, as described in column 3, lines 58-63:

"Holders 10, 34 and 52 can be made of any slightly resilient material, such as nylon, polycarbonate, acrylic plastic, etc. However, even if the holder is made of a non-resilient material, such as wood or metal, the chopsticks themselves will have sufficient flexibility to be used,"

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 9

The device holds a pair of chopsticks parallel to each other, and the operator's fingers are used to move the end of the chopsticks together or apart as permitted by the slight resilience of the holding portion or the resilience of the chopsticks themselves. Webster's New World Dictionary defines resilience as "the ability to bounce or spring back into shape, position, etc." The elongate design of the holding portion and connection means (collectively, "Laramie coupling") and their stiff nature resulting from the use of slightly resilient or non-resilient material in their fabrication, restrict pivoting of the chopsticks on an axis perpendicular to their shafts through the chopstick holder and cause them to "snap back" into their parallel position. Rotation of the chopsticks along their axes is restricted by the friction fit of the chopsticks in the through holes of the chopstick holder. Claims 3-6 and 12-14 claim splines in the through holes to further prevent rotation of the chopsticks in the through holes, showing he inventor's intention to limit or prevent rotation of the chopsticks in the holding device. Therefore, the Laramie device controls the relative positions of the chopsticks and converts two chopsticks into a pair of tweezers for picking up food. The holding device and connecting means are designed to keep the lower ends of the chopsticks in close opposition by holding the shafts as parallel as possible. If the coupling permits excessive pivoting, it will be difficult for the operator to bring the lower ends together, so pivoting is minimized as mentioned above. The Applicant's coupling, which allows free pivoting and rotation of the shafts, would not be suitable for the Laramie device, for example the flexible chain coupling of the Applicant's invention would render Laramie's device

Applicant Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 10

useless, because it would not hold the chopsticks in parallel positions. Also the relatively inflexible coupling of Laramie would not permit the free pivoting and rotation required in the Applicant's device, so the Laramie coupling could not be used in the Applicant's device. The two inventions are different and operate on different principles.

The Examiner described the connecting means as a:

"flexible coupling means (being formed from[sic] 'any [sic.] resilient material...plastic,etc'; column 3 lines 59[sic]-62 having a pair of loops (as seen in figure 3) which is slideable along the shafts, can allow the shafts to rotate about their axes and is clampable in desired positions".

The exact quotation from Laramie is described in column 3, lines 58-63:

 "Holder 10, 34 and 52 can be made of any slightly resilient material, such as nylon, polycarbonate, acrylic plastic, etc. However, even if the holder is made of a non-resilient material, such as wood or metal, the chopsticks themselves will have sufficient flexibility to be used,"

In response it must be noted that Laramie does not describe the coupling as flexible and states that the holders can be made of "any slightly resilient material". In fact, Larimer describes the chopsticks as flexible and states that the apparatus is functional even if the Laramie coupling is non-resilient. That is because a highly flexible, or highly resilient, material

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 11

would not provide the control required to keep the chopsticks generally parallel with each other.

It is respectfully suggested that figure 3 does not depict a "loop", which Webster's New World Dictionary defines as "the more or less circular figure formed by a line, thread, wire, etc. that curves back to cross itself". If a loop were to be used, the elongate portion and the web would have more or less equal lengths along the chopstick shafts, and such length would approximate the thickness of the web. Such a coupling would have little control over pivoting of the chopsticks and therefore little control of the parallel positions of the chopsticks. Figure 3 depicts a molded object which has two elongated cylindrical "holding portions" connected by a web which is about one half the length of the holding portions, which is designed to provide control that is not possible with a simple loop.

In response to the statement that the Laramie coupling is "slideable along the shafts, can allow the shafts to rotate about their axes and is clampable in desired positions", if the Laramie coupling is slid along the shafts, the device will not serve its intended purpose, which requires the coupling to be located at the outer ends of the shafts. Furthermore, a clamp is defined by Webster's New World Dictionary as, "an appliance with two parts that can be brought together, usually by screws, to grip something.", and Figure 3 does not show a clamp of that nature. The steps taken by Laramie to restrict rotation of the shafts are discussed above.

Applicant Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 12

In summary, the Laramie coupling and the Applicant's coupling differ in important ways: 1) Applicant's coupling is highly flexible to permit easy movement of the grasping elements, whereas the Laramie coupling is at most slightly resilient to limit the movement between the grasping elements; 2) the applicants apparatus depends for its function on easy movement of the grasping elements relative to each other, whereas the Laramie invention depends on resistance to movement provided by elongated members of stiff material; 3) the Applicant's coupling can be moved along the shafts of the grasping elements to other functional configurations, whereas the Laramie coupling is useful only at the ends of the grasping element shafts; and 4) the Applicant's coupling intentionally permits rotation of the grasping elements around their axes, whereas the Laramie coupling intentionally restricts such rotation by frictional engagement or special splines.

Applicant respectfully traverses and submits that this rejection is in error. Since the elements of Laramie and the Applicant's invention are different, it is respectfully requested that claim 1 be allowed. Furthermore, since the dependent claims of limitation, claims 8, 9 and 11-15, claim elements of a different invention than in Laramie, it is respectfully requested that these claims be allowed.

The examiner has cited three separate patents independently as anticipating the Applicant's invention. As argued above regarding Lee, no reason was given for using multiple references, so it is difficult to provide a reasoned response. If one assumes that the Examiner cited Larimer to show that a

Applicant Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 13

characteristic not disclosed in Davis, presumably flexibility, is inherent, then since Davis was very careful to use a hard, rigid coupling material to eliminate flexibility, and Laramie requires a coupling material that is non-resilient, or at most a slightly resilient, the characteristic of flexibility is certainly not inferred.

Response to rejection of claims 4, 5 and 10 under 35 USC § 103(a)

Claims 4, 5 and 10 are rejected under 35 U.S.C. § 103 (a) as being unpatentable over Davis '359 in view of Cox '484. The basis for all obviousness rejections is set forth under 35 U.S.C. § 103(a) that provides:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

As discussed above in the answer to Examiner's rejection based upon anticipation by Davis, Davis employs a rigid coupling to join two opposing shovels in a configuration that permits its use as a post hole digger. The coupling allows one of the shovels to pivot around an axis perpendicular to their shafts,

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 14

but prevents rotation of the shafts. The coupling can be moved from its operating position to use the shovels individually, but will not function as a post hole digger if the coupling is moved away from the operating position.

Cox '484 joins two garden rakes by passing a metal pin through their shafts at a point about half way between the tines and the ends of the shafts in such a way that the arrays of tines can be extended apart and drawn together to pick up leaves. The device works like ordinary ice tongs, which were known long before Cox was issued. Cox teaches that a strong metal coupling is needed to hold the two rakes together at the pivot point, and that the coupling will prevent rotation of the rakes about the axes of their shafts and will prevent movement of the coupling along the shafts. It does show that rakes can be joined in a useful manner similar to that used by Davis to join shovels, except that Cox joins the rake shafts at their midpoint and Davis joins he shovel shafts near the shovel heads.

In the rejection of claims 4 and 5 (claiming rakes as the grasping elements) and claim 10 (claiming two loops and a chain as the coupling means), the Examiner states that

"Davis fails to show the use of rakes. However, Cox teaches that it is well known to provide rakes in such a grasping configuration and to do so using a diverse hinge means rendering the claimed chain an art recognized equivalent and an obvious matter of choice of design. It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the device of

Applicant Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 15

Davis with the teachings of Cox in order to provide a grasping device having greater operational range "

Claim 1, the independent claim that describes the invention, is not rejected under 35 USC § 103(a). The claimed apparatus of claim 1 provides a new way of using "gathering devices," which gathering devices may include known and patented objects, such as rakes, as elements. Claims 4 and 5 are dependent claims for the use of rakes as elements of the apparatus claimed in claim 1. Applicant is not claiming rakes as a novel invention, but as an integral part of such an apparatus. In a similar manner, Cox claims two rakes as integral elements in his apparatus, although rakes were certainly known before then, and the opposed use of rakes and shovels was disclosed or claimed in many inventions cited during the course of prosecution of this patent application. For example, Laughlin, Grass rake tongs, US 5,564,266, October 15, 1996 and attached as Exhibit A, claims:

"1. Grass rake tongs, comprising: a pair of rakes each having an array of tines joined to a lower end of a handle; and means disposed through said handles at a point approximately mid-way between a lower end of said tines and an upper end of said handle"

In Laughlin '266, two rakes are joined by a pin through their handles as in Cox '484. The rakes are not claimed as rakes, but are claimed as part of a pair of tongs. Cox, Laughlin and the Applicant's apparatus are different inventions that are not obvious from prior art, but some elements of them, such as rakes, can be the same. Therefore, Applicant respectfully

Applicant : Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 16

traverses and requests that the rejection of claims 4 and 5 be withdrawn.

Claim 10 is a dependent claim for using a chain as the flexible coupling claimed in claim 1. There is no use of a chain coupling in the cited references, Davis '359 and Cox '484. The claimed chain coupling permits the parts to move in any way and does not have the attributes of a hinge. Hinges, and the couplings of the references, restrict motion of the joined parts in a predetermined way, are not moveable along the shafts and prevent rotation of the shafts along their axes. The referenced inventions require fixed couplings for their performance, so teach away from the use of a chain coupling. For these reasons, a chain and a hinge are not "art recognized equivalents" providing equivalent performance. Furthermore, it is respectfully submitted that one of ordinary skill in the art would not attempt to use a flexible chain coupling where the controlled motion of a hinge is required or consider it obvious to replace the pin coupling of Cox with the inflexible coupling of Davis. Therefore, Applicant respectfully traverses and requests that the rejection of claim 10 be withdrawn.

CONCLUSION

For the above reasons, Applicant respectfully requests that the above remarks be entered and made of record in the present application. An allowance is earnestly requested.

If a telephone interview would be of assistance in advancing prosecution of the subject application, Applicant's undersigned

Applicant Herbert Howell Waddell
U.S. Serial No.: 09/693,239
Filing Date : October 20, 2000
Page : 17

attorney invites the Examiner to telephone at the number provided below.

No fee is deemed necessary in connection with the filing of this Communication. However, if any fee is required, authorization is hereby given to charge the amount of any such fee to Deposit Account No. 50-1891.

Respectfully submitted,

Albert Wai Kit Chan

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I hereby certify that this paper is being deposited this date with the U.S. Postal Service with sufficient postage for first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450 Alexandria, VA 22313-1450.

Albert Wai Kit Chan 9/17/04
Albert Wai-Kit Chan Date
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/693,239	10/20/2000	Herbert Howell Waddell	IP-902	8560

7590 06/18/2004

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EXAMINER

PEZZUTO, ROBERT ERIC

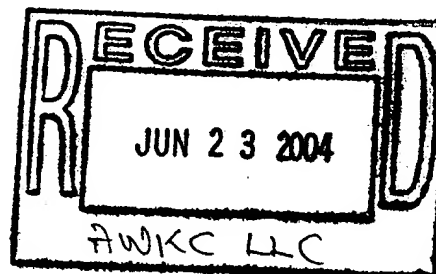
ART UNIT	PAPER NUMBER
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3671

DATE MAILED: 06/18/2004

ROA Dye
9/18/04

Please find below and/or attached an Office communication concerning this application or proceeding.



Office Action Summary

Application No.

09/693,239

Applicant(s)

WADDELL, HERBERT HOWELL

Examiner

Robert E Pezzuto

Art Unit

3671

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on March 4, 2004.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-15 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-15 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 6-9 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Davis '359. Davis discloses an apparatus capable of gathering, picking up and carrying materials (figures 1-4) comprising two grasping elements (shovels, as seen in figures 1-3) each having shafts (A,A') and a flexible coupling means C (Davis states on lines 40 and 41 that C is "made of malleable iron" and *Webster* defines "malleable" as being *flexible*). Also, Davis shows the coupling means being moveable along the grasping means shafts (as seen between figures 1 and 2) and because the top portions of the Davis handles are rounded, they can inherently rotate about their shaft axis while the coupling means is located at this rounded portion. Further, Davis shows the diameter of the shafts to be between 0.5 and 3 inches and shows their length to be between two and six feet.

Claims 1, 8, 9, 11, 12 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Lee '328. Lee discloses an apparatus for picking up and carrying materials (figures 1-3) comprising two grasping elements A which each have shafts 15 and a flexible coupling means (metal spring means 17) having a pair of loops (as seen in figure 3) which is slideable along the shafts, can allow the shafts to rotate about their axes and is clampable in desired positions.

Claims 1, 8, 9 and 11-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Laramie '663. Laramie discloses an apparatus for picking up and carrying materials (figures 1-7) comprising two grasping elements (12,14) which each have shafts (as seen in figure 1) and a flexible coupling means (being formed from "any resilient material...plastic, etc; column 3, lines 59-62) having a pair of loops (as seen in figure 3) which is slideable along the shafts, can allow the shafts to rotate about their axes and is clampable in desired positions.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4, 5 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davis '359 in view of Cox '484. Davis discloses the claimed device substantially as discussed above but fails to show the use of rakes. However, Cox teaches that it is well known to provide rakes in such a grasping configuration and to do so using a diverse hinge means rendering the claimed chain an art recognized equivalent and an obvious matter of choice of design. It would have been obvious to one having ordinary skill in the art at the time of the invention to provide the device of Davis with the teachings of Cox in order to provide a grasping device having greater operational range (i.e., use for better grasping lawn debris, etc.).

Conclusion


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert E Pezzuto whose telephone number is (703) 308-1012. The examiner can normally be reached on 7:00 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas B Will can be reached on (703) 308-3870. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Application/Control Number: 09/693,239
Art Unit: 3671

Page 5

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Robert E Pezzuto
June 10, 2004

Notice of References Cited

Application/Control No.

09/693,239

Applicant(s)/Patent Under

Reexamination

WADDELL, HERBERT HOWELL

Examiner

Robert E Pezzuto

Art Unit

3671

Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
	A	US-2,997,328	08-1961	LEE WALTER F	294/99.2
	B	US-3,323,825	06-1967	ARIMA THOMAS N	294/99.2
	C	US-3,688,484	09-1972	Eugene O. Cox et al.	56/400.12
	D	US-4,787,663	11-1988	Laramie, Leon A.	294/99.2
	E	US-5,697,659	12-1997	Calagui, Juanito	294/99.2
	F	US-			
	G	US-			
	H	US-			
	I	US-			
	J	US-			
	K	US-			
	L	US-			
	M	US-			

FOREIGN PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Country	Name	Classification
	N					
	O					
	P					
	Q					
	R					
	S					
	T					

NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages)
	U	
	V	
	W	
	X	

*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
Dates in MM-YYYY format are publication dates. Classifications may be US or foreign.

Applicant : Herbert Howell Waddell
U.S. Serial No. : 09/693,239
Filing Date : October 20, 2000

As noted in section II. RELATED APPEALS AND INTERFERENCES, no prior and pending appeals, interferences, or judicial proceedings have been filed to the knowledge of Appellant, Appellant's legal representative, or assignee which may be related to, directly affect, or be directly affected by or have a bearing on the Board's decision in the pending appeal.

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